No. 814.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

C. H. SOUTHER and W. S. CROSBY,
APPELLANTS,

vs.

SAN DIEGO FLUME COMPANY,
APPELLEE.

## APPELLANTS' REPLY BRIEF.

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Pursuant to the leave granted by the Court, the appellants submit a brief reply to such points of appellee's argument as seem to call for notice, not meaning to concede, however, any that are not touched upon.

**Rescission Cognizable as Defense to Cross-Bill.**

Much of appellee's brief is devoted to an attempt to show, what it is claimed this Court decided on the former appeal, viz., that the appellants' pleadings and proofs showed no ground for the equitatable remedy of cancellation of the contract. Appellee's counsel fail to regard the distinction between this extraordinary remedy in equity for the annulment of a contract, granted at the suit of a plaintiff, and the ordinary remedy, available either in law or equity, by way of defense to a suit on the contract where there has been a failure of consideration, or such a breach by one party as excuses the other from further performance. This distinction was recognized in the former decision of this Court (which counsel entirely misconstrued), and it was expressly declared that the question of rescission of the contract would be cognizable as a defense to the cross-bill in this case. (See Fed. Rep. vol. 90, p. 171). This is the law of the case and settles the question beyond dispute.

Mathews v. Bank, 40 C. C. A. 444;
100 Fed. 393.

**The Evidence Establishes Appellants' Defenses to the Contract.**

In considering the evidence, and the questions of fact to be determined in this case, it is important to note, that the appellee's cross-bill did not waive an answer under oath, and consequently, all the allegations of the answer thereto, responsive to the cross-bill, are presumed to be true, unless rebutted by the testimony of two witnesses, or one witness and strong corroborative evidence.

I Foster's Fed. Prac., Sec. 84, p. 173;
Vigel v. Hopp, 104 U. S. 441;
3 Desty's Fed. Pro., p. 1757.

Again, practically all the matters sought to be established by appellants' evidence, except the question of damages, were admitted by the appellee, through its counsel, at the taking of the testimony: see the statement of appellee's counsel, Record, p. 119, as follows:

"That is all admitted, Judge. There is no controversy about that. In fact most all you are proving here is admitted—I believe everything except the question of damages."

So there should be no question but that the weight of the evidence inclines decidedly in favor of appellants.

**Appellants' Pleadings Sufficient.**

(Appellee's Brief, pages 14-15.) The point, that appellants' pleadings do not show the necessary facts on which to base a right by priorty, is not well taken. It was alleged that appellee had largely over-sold its capacity and, for that reason, had failed to furnish appellants with the water to which their contract entitled them. The breach of the contract by deprivation of the water was the fact of which appellants had knowledge; the exact dates and amounts of appellee's sales of water they did not, and could not be expected to, know, nor, therefore, plead. Nor was it material to their right to rescind the contract, whether the water to which it entitled them was supplied to other consumers of the appellee whose rights were subordinate to the appellants' rights, or whether all the water, which the appellee had the capacity to furnish, had been sold by it prior to its contract with appellants and was delivered to such purchasers, so that appellants got nothing by their contract.

As to priority of right of the San Diego Water Company: Counsel must have overlooked the allegations of the answer on this head. It is clearly stated (Record, pp. 69-70) that the contract and right of the appellants was prior to the sales of water to that corporation; and it is shown in appellants' open-

ing brief (pp. 51-2) that the proofs sustained these allegations.

In considering the allegations of the cross-bill and the answer thereto, as well as the evidence in the case, it would, it seems to us, be fair to regard the original bill and answer, at least as far as ascertaining the theory of the case, especially in view of the stipulation of the parties, regarding the effect of the evidence and pleadings in the respective causes. (Record, p. 104.)

Counsel note (brief, p. 13) that there was no prayer for rescission or for damages in the answer to the cross-bill. There was no necessity for it; both forms of relief had been prayed for in the original bill, and this Court, as a court of equity, will not refuse the complainants relief to which they are entitled, for want of a repetition of that prayer in the answer, or for want of any prayer.

**Evidence Establishes Appellants' Defenses to the Cross-Bill.**

The description, which counsel give of the Flume Company's water system differs widely, as it seems to us, from anything shown by the evidence. What the evidence really establishes in this regard we tried to and think did show in our first opening brief (pp. 55-6.)

Page 16): Mr. Doolittle was somewhat in error as to the absolute and relative amount of rainfall in the season of 1893. The Company's own record for that season (Record, p. 462) showed 15.05 inches; and for the season of 1887-8 only 22 inches. (Record, p. 459.)

Counsel say that this was the only occasion, before or since, that the Company failed to furnish the full amount of water demanded of it. This statement will bear explanation. The Company had sold considerable more water than was actually called for and used by its consumers, and more than it could supply, if all sold were called for. The demand for actual water sold, was steadily increasing, but prior to this time had

not overtaken the actual supply, and this will explain why there had been no shortage prior to that year. There is nothing in the record showing the condition subsequent to 1893-4, except for the one season immediately following. As to subsequent dry seasons see statements of appellee's brief, page 43.

(Page 16): The fact that prior to 1893-4 appellee had furnished all the water demanded of it is no proof of its capacity to supply all it had obligated itself to furnish, which was many times the amount demanded. (Appellants' opening brief, pp. 55-58.) What has happened since is not shown in the record, and is immaterial, as is also the evidence as to appellee's contemplated enlargement of its system.

Of what avail is the future construction of reservoirs, to a consumer whose contract is unfulfilled by the appellee company, and whose crops have been lost, because of appellee's failure to provide reservoirs before? What advantage is there in the appellee's filing on water courses, which supply no water?

(Page 18:) The question is not whether appellee was able to furnish the water actually *demanded.* If appellee had more than sold its capacity before (or for that matter after) the contract with appellants was made, this of itself on discovery, gave appellants the right to rescind. And if, as we contend, appellee's failure to supply appellants with water was due to its supplying it to others having only a subordinate right thereto, it is immaterial what the appellee's capacity or the demand upon it may have been.

The statement that the natural flow of streams tributary to appellants' system was sufficient to supply the demands for water except during the irrigating season, if true as to years preceding 1894, was not true in that year, and the increasing demand for water rendered it unlikely that it would be true in subsequent years.

(Page 21): Had the appellee company fulfilled even the obligation which counsel concede, in making additions to its system and keeping pace with the actual demands of its consumers, appellants would have received the full amount of water to which they were entitled. The contract itself provided: "The party of the first part shall use and employ all due diligence at all times in repairing and protecting its said flume and in maintaining the flow of water therein." (Rec. p. 33.)

But this provision the company ignored. Appellee is not entitled to demand $120.00 an inch from the appellants, especially not for water which it does not furnish. Nor is the adjudication of the Board of Supervisors any evidence against these appellants of the amount which appellee has expended upon its system; nor do we perceive the relevancy of such evidence in this case in any view of it. As to what is the best policy for the company we do not presume to know; but we would suggest that a policy, which would enable it to comply with its contracts (which, from the statements of its own officers and its own evidence in this case, would have been entirely practicable), thereby avoiding the liability for damages, might be better from the stand-point of economy, than the "penny wise pound foolish" one, which it has followed.

(Page 22): We regret that appellee seems still inclined to repudiate its obligations under the Indian Reservation contract, by which defendant acquired valuable and essential privileges, riparian rights and right of way for its works. The amount heretofore supplied under that contract is, of course, not the measure of appellee's obligation thereunder.

**Appellee's Sale of Water to San Diego Water Co. Not Warranted by the Contract.**

(Pages 22-25). In support of the claim that the Flume Company was in fact supplying the City of San Diego and not, as we have contended, the San Diego Water Company, counsel suggest that the arrangement between the companies saved the city the expense of another distributing system, i. e., we suppose, the distributing system which the appellee would have had to install in order to supply the city direct, instead of through the San Diego Water Co. But the fact is that it was the Water Co., not the Flume Co., that supplied the city (and, presumably, paid for the distributing system used), and the Flume Co. was merely one source from which the Water Co. could derive its supply of water. It had its own plant and appliances for pumping and diverting water from the San Diego River, and there were probably other sources of supply to which it could and would have resorted if the Flume Co. had not sold it water. (Rec., pp. 239–40). And the record shows that the arrangement between the two corporations, under which the water was actually being supplied in the year 1894. and previously, was one which the parties treated as terminable upon notice, at any time. (Rec., pp. 355, 270). It was not being furnished under the alleged contract between the two companies, introduced in evidence. (Rec., p. 313). And the evanescent character of the arrangement between the two corporations is well illustrated by the testimony of the secretary of the appellee company (Rec., p. 261): "We have had so many changes from water company to flume company, and pumping and all that sort of thing, that I don't know where we were the year before." How can it be contended that such transactions between these two corporations could justify the Flume Co. in disregarding its binding contracts to supply irrigators with a con-

tinuous and perpetual flow of water, failing in which their farms would be ruined, in order to sell the water at a higher price to the other water corporation, which in turn sold it for irrigating as well as domestic uses? (Rec., pp. 361–4).

The suggestion that appellants were the only consumers of the appellee who found fault with the failure of the company to comply with its contracts in the season of 1894 is hardly worth noticing. For the real (and contrary) facts in the case, see the statement in the letter of the appellee's vice-president (Rec., p. 314).

Counsel refer to the suffering, which they say resulted from the appellee's cutting off its supply of water to the San Diego Water Company. We think a careful reading of the testimony of appellee's witness, Flint, (Record, pp. 355–8), in connection with the order which he obtained from the Circuit Court (Record, pp. 359-60), and the testimony of witness Barber, (Record, pp. 241-3) will show that the "suffering" in question was simply from the want of water for the sprinkling of lawns and ornamental gardens, and the like uses. The provision of the contract referred to by counsel surely can not be invoked to justify the withdrawal from the country consumers of water purchased under prior contracts, become appurtenant to their lands, and absolutely essential to the preservation of their crops, trees and vines, planted in faith of its continuance, in order to supply the water under a subsequent contract to another corporation for the uses of city residents mentioned above. The superiority of the country irrigators' claims was recognized in the order of court above referred to. Certainly this clause of the contract does not contemplate or sanction the supplying of water for irrigation to the consumers in or near the city, as was done by the appellee through the San Diego Water Company in this case.

**No Ground Shown for Denying Rescission of the Contract.**

(Pages 25–42). The greater part of the argument on these pages, directed as it is against the right of appellants to the equitable relief of cancellation of the contract, is irrelevant to the case as it now stands, as above pointed out, and requires no further reply. The fact, if it was a fact, that the appellants had an adequate remedy by mandamus, can not deprive them of their right to the relief now sought. But mandamus does not lie to compel the performance of a contractual obligation, (however it might be as to purely a public duty).

California Code Civ. Prac., Sec. 1085;

II Spelling on Extraordinary Rel., Sec. 1379;

High on Extraordinary Rem., Sec. 25.

Hence, even if appellants could have compelled the appellee to supply them with water, under the authority cited by appellee, this would not have been by virtue of the contract but by reason of the duty of the appellee company as a quasi public corporation; and the writ would not have been granted unless the appellee had water which it could legally supply to the appellants; and if it had such water, its failure to supply it was a breach of the contract clearly giving appellants the right to rescind. Certainly it is not for the appellee, after having violated both its duty under the contract, and its public duty as a water corporation, to say that because the appellants did not attempt to compel its performance of the public duty, which it was unable to perform, they can not have relief for its breach of the contractual duty. And inasmuch as the appellants, if they had obtained a supply of water from the appellee by mandamus, would doubtless have been compelled to pay therefor at the rate fixed by the public authorities, viz.: $120.00 per inch, and not at the contract rate of $60.00 per inch, there

is no ground for the assertion of counsel that their failure to pursue this remedy shows that the appellants were not seeking their rights under the contract, but merely trying to evade the payment of the agreed price for the water-right.

It is contended that appellee's failure to comply with the contract was only partial and temporary. And that appellee merely failed to deliver a part of the water contracted for, which shows no intention on its part to abandon the contract and that the breach could be fully compensated for in damages.

In the first place, there was not a partial or temporary failure to furnish the water, but, on the contrary, there was a complete failure to furnish the fifteen inches of water under the contract rescinded, and the evidence shows that the failure was permanent, for the reason that the appellee is unable to supply all the water that it has previously obligated itself to furnish. The rescission is based upon the fact that all of the fifteen inches of water required by the rescinded contract of March 12th, 1890, failed and was not furnished after June 9th, 1894, and it is so alleged in the answer to the Cross-bill.

*Travelers' Insurance Co. vs. Redfield,* 4 Pac. Rep. 194, cited to support the contention that the breach of contract was only partial, and temporary, and that, as it could be fully compensated for in damages, a Court of Chancery will not cancel the contract, has no application here for the reason that there was not a partial or temporary failure of the water, and it does not sustain the contention of the appellee here that appellants could be fully compensated in damages for the deprivation of the water. In that case it appears that the plaintiff Redfield and another made a promissory note to one Henry, in payment for water rights, for $6,400.00, due five years from date, with interest of 10 per cent. per annum, and secured it by a deed of trust upon certain land owned by them. The

interest of Warner in the land was subsequently acquired by Redfield, who assumed the payment of the note and trust deed. The sole consideration of the note was a title to eight water rights to be secured to the makers by the Irrigation Company and the Insurance Company, the water to be taken from the canals of the Irrigation Co. and used in the irrigating of Redfield's land. The Irrigation Co. contracted a bonded indebtedness, secured by a deed of trust upon all of its property, executed to one Davis, Vice-President of the Insurance Company, as Trustee, which latter Company was the owner of all the bonds so secured.

The plaintiff under the transfer from the Company, had the undisturbed use of the water rights for seven years, but at the time of the transfer the Company was in the hands of a trustee, and this trustee having failed to complete the conveyance of the water rights, by executing a release therefor, to the plaintiff the latter sought to cancel the note and the trust deed securing the same. It was held that the defendant trustee, having in his answer tendered a sufficient deed to the water rights plaintiff was bound to accept it, and there could be no cancellation of the note, there being no ground of fraud or of the failure or inability of the Company to furnish the water, or irreparable injury by being deprived of the water, and the complete title might be secured by the acceptance of the deed tendered.

This is a very different case from the one in hand, for the reason that no conveyance or instrument was necessary to be executed or passed, but the consideration for the instrument that had been executed, viz: the contract of March 12th, 1890, wholly failed, and the appellants by being deprived thereof suffered great and irreparable injury. This we submit presents a very strong and urgent case for the relief sought in this action.

The other case cited to the same point, *Kimball vs. West,* 15 Wall. 377, is one where the plaintiffs brought their bill in Chancery to rescind a contract for the executed sale of land. The deed contained a clause of *general warranty.* The title to a part of the land conveyed was defective, but before the case came to a final hearing the defendant purchased the outstanding and conflicting title to the portion of the land, and tendered to plaintiffs such conveyances as made their title perfect. The Circuit Court dismissed the bill of plaintiffs, and this was sustained by the Supreme Court on the ground that for any defect in their title the law gave them a remedy by an action on the covenant in the deed, and as it appeared at the time of the hearing that the defendant was able to remedy the supposed defect of the title in point of fact and had remedied the defect at his own cost, the plaintiffs must show some *loss, injury or damage by delay,* in perfecting the title, before they could claim a rescission of the contract; and even if this could be shown, which was attempted in the case, it was held that the Court as a general rule would not be authorized to decree a rescission if compensation could be made for the injury arising from the delay in making good the original defect in the title, because a remedy existed on the covenant.

This certainly differs widely from the case at bar, in which there was not merely a failure of title to the water, but the failure of the water or property itself, for the loss of which and the injury resulting therefrom, appellants could not be adequately compensated in damages.

All the other cases except *Burge vs. Cedar Rapids etc. R. R. Co.,* 10 Ia. 101, are to the effect that where a contract is severable, and only partly performed and an action is brought thereon, the plaintiff may recover for the part performed, and the defendant may have his damages for the breach deducted from the amount so recovered by the plaintiff, for the reason

that the breach would give the defendant a right to sue.

But even if this doctrine applied to the character of property, the subject of the complaint in question here, which we do not admit, still the contract is not severable, because the money consideration was to be paid on one side and the water delivered on the other side in their entirety, and as the water was to be delivered continuously, it was an executory contract.

See *Gomer vs. McPhee,* 31 P. Rep. 119.

The other case, *Burge vs. Cedar Rapids, etc. R. R. Co.* simply holds that where rescission is sought of a partly performed contract, the party seeking the rescission cannot effect it without restoring or offering to restore the consideration received, and the parties can be placed in *statu quo.*

Defendant's counsel say that appellants were deprived of their water for only four months. By this they mean to be understood as saying from the time that the water was cut off in June until the notice of rescission was given. As a matter of fact, the water was not tendered, notwithstanding the repeated demands for it prior to rescission until about the middle of December of the same year, a period of six months, during which time appellee confesses that it was unable to supply water to the appellants under their contract of March 12th, 1890. Besides appellee had control of the water gate connecting with appellants' pipe and did not open it and turn in this water it now says it was so anxious to deliver.

But whether the period of deprivation was four or six months is not material, when it is remembered that the first four months of the deprivation was during the irrigating season, when the use of the water for irrigation of the lands of appellants was indispensably necessary for the growth and preservation of their trees, vines and alfalfa, and also production of their orchards and vineyard.

If the deprivation of irrigation water during an entire irri-

gating season is trivial and of no consequence in Southern California, where so much depends upon the use of water for irrigation, the sooner it is discovered by irrigators the better.

It is common knowledge, and is established by the evidence in this case that trees and vines, dependent upon irrigation cannot be deprived of irrigation during a whole, or even a portion, of the irrigation season in Southern California, without great damage.

And it is idle talk to say, that one can be fully compensated in damages for the destruction or injury to the growth of irrigated producing trees and vines such as it is admitted were upon complainants' land.

Bearing fruit trees and vines that are destroyed may, it is true, be replaced by new young trees and vines, but the years of difference in growth, and fruit production, can never be made up. Nor can trees or vines once stunted or checked in growth for want of water during an entire irrigation season, with the most generous treatment overcome for a number of years afterward, if at all, the check on their growth and production capacity, caused by such deprivation of water.

Of these facts the Court will take notice, as they fall within the laws of nature, of which the Courts take judicial notice.

*Cal. C. C. P. Sec.* 1875, *subd.* 8.

*Brown vs. Anderson, 77 Cal.* 236.

1 *Rice on Ev., p.* 20, *subd. b.*

Finally, it is a most inequitable construction of this provision which would make it a warrant for the conduct of the appellee here, in undertaking to furnish a city with water to the detriment of country consumers whom it had previously bound itself to supply. Such a construction would work great injustice to the country consumers, as it has to the appellants in this case.

The appellee entered into two several contracts to supply

appellants with water, and then subsequently entered into an arrangement with the San Diego Water Company to supply it with water for a higher compensation per inch than it was receiving from the appellants; and its cupidity led it to commit the injustice of exhausting its water supply by furnishing the city with water, because it obtained a higher compensation from it than it could have obtained and did receive from the appellants under the contracts; and then to excuse this they say that the clause in the contract provides that they may practice such constructive fraud and injustice.

If such a clause in a contract can be given the construction that appellee contends for, then it may seek to and supply every city and town in the county that it may reach with water, and thus exhaust every drop of its water in supplying such cities and towns; and thereby entirely ignore the prior consumers in the country, and deprive them of water for domestic use and for irrigation. For if it may do it in the case of a single city or town, and to the extent of a single inch of water, it may do it as to all the cities and towns that it can reach, and to the whole extent of its capacity to supply water, because there is no limit in the clause in the contract, under which it seeks to justify such high handed conduct. That there are other water contracts of defendant's without this clause, (Rec. p. 145) shows that it discriminates in certain cases, between its consumers.

It is true that there was a shortage of water in the City of San Diego, owing largely to the fact that the water works of the San Diego Water Company in the San Diego River had been allowed to remain idle for a long time, and partly to the fact that the water in the wells in the River was low. (Trans. pp. 346-350.)

But it seems from the testimony of Mr. Flint, Superintend-

ent of the San Diego Water Company, (See above references), that his Company managed to supply the City with all the water it needed for *domestic use,* as well as for the irrigation of lawns and shrubbery sufficient to keep them alive, except that it was shortened at times in certain portions of the City. (Trans. pp. 310-311.)

It may be pertinently asked here if the construction appellee's counsel would now put upon the clause of the contract in question is correct, why is it that if the City was threatened with a water famine the appellee entirely cut off its supply from the City, as it did on July 21st.

See the views of appellee's Board of Directors on this point, as set forth in the Vice-President's letter to the President, dated June 22nd, 1894, (Trans. pp. 308-9), where it is said:

"If they are shut off (meaning the San Diego Water Company), and find they *actually* cannot supply more than half the City's requirements, and either take measures to force us to give them water under the theory that the City is entitled to first call, or make a strong appeal for help, the Flume Company will be in a better position with its country consumers, if it then responds partially, at least, to a demonstrated necessity."

If appellee felt sure of its position, why was it necessary to devise ways and means to work upon the sympathies of the country consumers and induce them to acquiesce in the appellee's sharing its water supply with the San Diego Water Company to relieve the contemplated distress of the inhabitants of the City?

The whole letter from which the above extract is made, as well as the subsequent letter, (Trans. p.310), indicates very strongly that the construction now sought by counsel to be placed upon the clause of the contract, is one in which the appellee had but little confidence.

It is claimed that appellants did not act promptly in rescind-

ing, because they waited some four months (in the meantime demanding, and endeavoring to secure, the water) before they gave notice of rescission. If they had attempted to rescind any sooner, appellee would now be claiming that their action was premature, and that they should have waited (as they did) a reasonable time to see if the appellee would not yet supply them with water in time to save their orchards and vineyard. (See opening br. p. 67.) Appellee was not injured by the delay, and all the water which it supplied to the appellants they were entitled to under their prior contract; and there was no false pretense on their part, nor any wrong to other consumers, in their receiving all of it from the appellee.

(Pages 36-8.) The appellee's counsel claim that appellants did not offer to restore what they received under the contract, viz: the conveyance of a water right to 15 inches of water. This is a mistake. See notice of rescission, Trans. p. 40. The conduct of appellee in refusing to consent to the rescission, shows that any more formal tender of a conveyance would have been likewise rejected; hence, none was necessary.

*Dowd v. Clark*, 54 *Cal.* 48.

*Sheplar v. Green*, 96 *Cal.* 218.

*Bucklin v. Hasterlip*, 40 *N. E.* 564.

And besides the rescission of the contract operated as a complete release and extinguishment by it.

*Civil Code, Sec.* 1688.

*Bradley vs. Gas Control Co.*, 102 *Cal.* 632.

*And cases in Opening Br.*

Furthermore, the appellee has been fully compensated for all the water which it supplied under the contract prior to the rescission; the sum of $2250.00 paid by the appellants as water

rentals fully paid for the water at the contract rate up to May 1st, 1894, and there is nothing in the evidence to show that it was not ample compensation for all the water received by appellants under the contract, including that supplied after May 1st, and up to June 9th; but if the Court should consider that the appellee is entitled to additional compensation for that period, it can be deducted from the $2160.00 paid by appellants to appellee, as interest, no part of which is now sought to be recovered by appellants, and if only one-half of the water to that date was received then, as we claim it was all received under the appellants' prior contract, then appellee has not shown that all the water was not paid for under the prior contract.

(Page 37.) It is contended that the appellants had no right to elect to take all of the water under one contract and none under the other, or first contract, on the theory that the latter was being fully performed. The answer is that as the contracts were separate and distinct from each other, and one prior in time to the other, appellants certainly had a stronger right to assume the position that they did, that is, that they were deprived of all the water under the second contract and not under the first, than the appellee had, or could have to apportion such amount of water as it might see fit, under the two separate and different contracts, as originally held by appellants.

(Pages 38-42.) We do not think the question of appellants' right to rescind, under our view of the facts in the case, calls for further discussion; and we submit that appellee has in no way overcome the effect of the authorities which we have cited. Its counsel overlook the oversale of its capacity as an element in appellants' grounds for rescission.

**Appellants' Right by Priority Established.**

Appellee's counsel accuse us of treating lightly the subject of right by priority. We certainly did not intend to do so; and we do not think we did.

We submit that counsel for appellee have pointed out no ways in which this Court can escape from the logic of the Statutes, and the decisions of this and other Courts, which establish a priority of right as between consumers actually receiving water from the same system of supply. Neither have they shown any rational ground for distinguishing between the priority of different consumers from the same Water Company, and that of different appropriators from the same water source; nor any reason why in one case the prior claimant should, and in the other case should not, take all the water to the full extent of his right to the exclusion of subsequent claimants. The enforcement of the rule of priority is as just and equitable in one case as in the other.

As to the case of Pallett v. Murphy, cited by us, and discussed in appellee's brief (p. 46), we are not advised what course was taken by the lower court, other than what appears in the report of the case on appeal (63 Pac. Rep., p. 366 et seq.); and we submit that we have given a fair statement of the substance and effect of that decision.

(Pages 48-56): Appellee's counsel advance the theory that the water appropriated and sold by a water company is to be regarded as taken under a single appropriation in which the several purchasers of the water became proportionate sharers. So far as the rights of the appellants here are concerned, a conclusive answer to this proposition is that their contract conveyed to them an absolute right to a specific quantity of water, and not to any proportionate share of the appellee's appropriation or supply. In support of their theory, counsel cite and quote at length the opinion of Chief Justice Helm in

Farmers' High Line Canal & Reservoir Co. vs. Southworth, 21 Pac. 1028.

In that case it was alleged that complainant was, and for many years had been, a consumer of water from defendant's canal; that the defendant Canal Company threatened to compel plaintiff to pro-rate his water with other consumers from the same canal, pursuant to the statute of Colorado providing for such pro-rating in times of scarcity; and that the plaintiff's rights were prior and superior to the rights of such other consumers. Three opinions are reported in the case; one, of Justice Hayt, holds the demurrer to the complaint properly sustained, because the mere allegation of prior right to water, without showing the facts upon which it is based, is but a conclusion of law; he also held, however, that "under some circumstances different users of water, obtaining their supply through the same ditch, may have different priorities of right to the water; that the appropriations do not necessarily relate to the same time."

The second opinion, that of Justice Elliott, concurs with that of Justice Hyat and discusses the questions involved more at length. Referring to prior decisions of the same Court, he says (page 1031):

"From these opinions, the conclusion seems inevitable that the 'better right' acquired by priority of appropriation, is applicable to individual consumers as between themselves when they receive the water through the agency of an artificial stream as well as when they receive the same direct from the natural stream. Also, that if the pro-rating of the water actually received into an irrigating ditch in time of scarcity between all the consumers can be effected by legislative enactment, then the superiority of right acquired by priority of appropriation is without protection or security; and houses and

other permanent improvements of prior appropriators may be rendered comparatively valueless."

The third opinion in the case, that of Chief Justice Helm, from which defendant quotes, while concurring in the judgment of the other Justices as sustaining the demurrer to the complaint, appears to be in disagreement with them on the point to which counsel cite it; i. e., the question of priority between different consumers; it is, therefore, not only "dictum," but the dictum of a dissenting opinion, and is not entitled to any weight as authority.

As to the case of *Wyatt vs. Larimer & Weld Irrigation Co.*, it is sufficient to say that the rights of the parties there were controlled by special provision of their contracts for pro-rating within certain limits; and also that the decision of the Court of Appeals in that case, which defendant cites, was reversed by the Supreme Court of the State, in

Wyatt vs. Larimer & Weld Irrigation Co., 33 Pac. 144.

With reference to these cases cited from the Colorado courts, it should be further observed that they were decided under constitutional provisions differing widely from those of California, and hence are not authority here and cannot overcome in any degree the effect of our statutes and the decisions of our courts thereunder, heretofore cited.

(Pages 56-7): Appellee's counsel seem to assume that we contend the water company should be limited in its sales to its capacity in a year of drought. On the contrary, our contention was for an "ordinary" year as distinguished from an "average" year, and this defendant apparently concedes to be correct.

Counsel for appellee are greatly exercised over the ruin, which they suppose would be entailed upon water companies, by maintaining their liability to consumers in such cases as the present. It is their own fault to make contracts which they

cannot fulfill and it cannot be true that the anticipated ruin of the company should excite more commiseration than the actual ruin of the consumer, which necessarily results from this very policy of excessive sales of water, for which there is no excuse on the part of the company, and no reason but the greed of gain. It was to protect irrigators from just this danger that the statute (Civil Code, sec. 552) was enacted; and the courts, in construing and enforcing it, have rightly perceived that it's true intention and effect is to give to the several irrigators of lands under one water system, rights by priority in the order of time of their taking of the water. As to the statutes making the company liable in damages for failing to supply to a consumer, in a year of light rain-fall, all he had been supplied in a year of greater precipitation, the answer is simply: the statutory duty is predicated upon actual ability of the company to supply, and it is not liable under the statute for failing to supply what it has not.

(Pages 58-9): The contention that appellants' allegations show no right under the law of priority has been answered. We do not understand how counsel conclude that appellants' right by priority is not made out by the evidence. The amount of water actually demanded of appellee in the season of 1894, under contracts prior to appellants, was much less than the amount which appellee actually supplied during that season; and hence the full amount required under appellants' contract might and should have beenfurnished to them by appellee without infringing upon any prior rights; instead of which, appellee supplied the water to which appellants were entitled to others having inferior claims thereto. (See opening brief, pp. 50-52.) In asserting in this connection that appellants have not alleged the invalidity of their contract on the ground of prior sales to and beyond the capacity of appellee, counsel overlook the allegations of paragraph 12 of appellants' answer

to the cross-bill (Record, pages 68-70); we insist that this pleading is broad enough to support both contentions of appellants; that the contract was without consideration from the beginning, because of prior sales by appellee to and far beyond the limit of its capacity, and, also, that if it had been valid in its inception, it would have become voidable because of its failure to supply the water therein stipulated for; and that on both these grounds appellants are entitled to a rescission of the contract and to damages.

**Capacity of Appellee's System.**

(Pages 59-60): The averment in the answer, to which counsel refer (see Record, page 68), as to the capacity of appellee's system, was not an admission that such capacity was as large as the amount which it was alleged not to exceed, for there was no allegation in that regard in the cross-bill itself; besides, the allegation was made upon such information only as the appellants had when the answer was filed, and they certainly ought not to be held bound by this allegation upon a matter so peculiarly within the knowledge of appellee, and not within their own. But, if that step is necessary, we would certainly ask leave to amend the answer to conform to the proofs. (See National Waterworks Co. v. Kansas City, 62 Fed., page 863.) What the proofs actually established has been shown (opening brief, pp. 55-57).

Counsel for appellee fail to distinguish between the theoretical capacity and duty of the flume and reservoir, and their actual duty and capacity.

**In Duty to Store Water.**

Pages 61-2): The claim that appellants should have provided storage for their water and that their damage resulted from their failure to do so, we have answered. (Opening

brief, pp. 70-71.) There is, it may be added, nothing in the contract, or in the law, requiring such storage by the consumer. Counsel understand the evidence as to the time consumed in irrigating complainants' lands. With the full flow of water to which their contract entitled them, only a small portion of the vineyards and orchards could be irrigated at one time; consequently, they require a continuous flow during practically the whole irrigating season. (Record, p. 119.)

On the rule as to measure of damages, defendant cites

Crow v. San Joaquin, etc. Co., 62 Pac. 562,

which, it is claimed, holds that the measure of damages for deprivation of water is the difference between the rental value of the land with, and without, water, less the cost of the water. But that was a case where it was attempted to recover possible profits of a crop which it was alleged would have been planted if the water had been supplied, but which, the water being refused, was not planted at all. And it was shown in defense that the crop intended to be planted was one which often produced no profits at all. The Supreme Court properly ruled that profits in such a case were too remote and speculative to furnish a basis of recovery. The distinction between that case and this is obvious. Here the lands have been planted with trees and vines which have come into bearing, and the direct pecuniary loss resulting from a deprivation of water necessary for their irrigation is, in such a case, a matter which can be determined with reasonable certainty. The evidence of the complainants in this case on the question of damages was the estimate of the manager of their ranch as to how much the various trees and crops upon the ranch were damaged by the loss of water. This evidence was admitted without objection, either to its substance or form, and was repeated on cross-examination, and it is too late now for defendant to take any exception to its sufficiency. The witness stated positively

and directly that the several crops and trees were damaged in certain specific sums, and this statement stands in the record uncontradicted, and it cannot now be challenged by defendant. Moreover, that the proper criterion of damage in a case where some crops are actually planted and produced notwithstanding the deprivation of water, is the actual damage to such crops and to trees and the like growing upon the premises, and not the difference in rental value, was decided by the Supreme Court of Colorado, in

No. Colo. I. Co. v. Richards, 22 Col. 450; 45 P. 423,

which shows the distinction between a case where crops have been planted, and where there has been no attempt to cultivate. It is submitted, therefore, that complainants' evidence on the question of damages was competent and sufficient.

**Offer of Appellee to Remit Part of Amount in Decree.**

Since the foregoing was put into print, we have received a copy of appellee's offer to remit $685.00, which appellee admits is more than was shown to be due. This offer we acknowledged service of, without waiving any rights of appellants on this appeal, or to costs.

At the same time we were served with a copy of additional brief of appellee, which relates solely to this offer to remit. Appellee, after admitting the errors pointed out in appellants' opening brief, and referring to its offer to remit, says, it will be evident that the appeal was not prosecuted on account of this mistake, and that a copy of the decree was submitted to appellants' counsel several days before it was signed, etc.

Now, while the first statement is controverted by the record, and the second is as to matter de hors the record, we admit having received a copy of it a day or two before it was

submitted for signature, for the purpose of examining the form of the decree as to lien and sale; and it was stated we had no objection to the form of the decree. But no examination as to the findings of fact including the amounts found to be due, was made until an appeal was decided on, and steps taken to perfect it, which was some time after the decree had been entered.

So, while all this matter being outside of the record, makes it immaterial, yet we think it removes the impression sought to be created by counsel for appellee as to our knowledge of the correctness of the findings, before we were called upon to examine and test them.

Appellee's counsel were charged with the duty of preparing the decree, which appellants resisted to the last, and in its zeal in computing interest on interest outside of the contract, but within the law, and stretching the recovery to the utmost, included interest and water rental not justified by the pleadings or evidence which it now confesses as error; but forsooth say appellants still ought to be mulct in the cost.

This error is not a mere clerical one; (See Hicklin v. Marco, et al. 64 Fed. Rep. 609) but is one that is vital and substantial, going to the question of whether the findings of fact attacked, are justified by the evidence, and one upon which this appeal is based. It is not a question, therefore, that could be corrected on a mere suggestion in the court below, after the decree had been entered; but one that requires, as we pointed out in our opening brief, p. 69, an examination of the evidence, and which it is proper to correct on this appeal, the same as any other finding attacked.

And moreover this is an error that appellants' counsel was even not persuaded of at the time of the oral argument on May 7, 1902, eleven days after our brief had been served.

And as was shown at the argument the appellants here have already paid large costs, on the other appeal and lost much time owing to the decision in Lanning v. Osborne, and without their fault, in order to have this case determined on the merits; and we respectfully submit that in any aspect of the case appellant should not be charged with further costs, unless this court is constrained to that end.

**Conclusion.**

There are other points in appellee's brief which we will not attempt to reply to specifically, as we submit that they are fully and completely answered in appellants' opening brief; and that the appellee in its brief has signally failed to show that the appellants were not justified in rescinding the contract and standing upon such recission, and likewise failed to show by the evidence that the exception in the contract relied upon by the appellee excused it for the non-performance, and violation, of its contract with the appellants, of March 12, 1890.

Wherefore, appellants respectfully submit, that the rescission of the contract made by them should be upheld by this Court by its decree; and that whether this Court shall see fit to award any damages or not, still the evidence is ample to justify it in holding that a sufficient and complete defense is shown by the appellants to the cross-bill of the appellee, and the appellants are at least entitled to a decree denying the appellee any relief upon its cross-bill; and, on the other hand, if from any possible phase of the case on the evidence, which we cannot discern, this Court should hold that the rescission was not effected, then the evidence surely establishes such a breach of the contract as to entitle the appellants to a decree for damages and costs, as an offset to whatever appellee may be awarded. But we respectfully submit, that the pleadings and the evidence,

fairly construed, even without the answer to the cross-bill as evidence, or the admission of cross complainant, above noted show that the appellants are entitled to a decree rescinding the contract, and for damages, and for costs.

Respectfully submitted,

BICKNELL, GIBSON & TRASK,
*Solicitors and Attorneys for Appellants.*